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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 5 [illegible]

THE WESTERN UNION TELEGRAPH COMPANY,
a Corporation, Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, Co-partners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX.

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
SPECIFICATIONS OF ERRORS TO BE URGED	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	20
APPENDIX	21

TABLE OF CASES.

Adams Express Co. v. *Croninger* (1913) 226 U. S. 491	6n
Atkins v. *The Disintegrating Company* (1873) 18 Wall. 272, 305-306	12n
Davenport v. *Western Union Telegraph Co.* (1932) 91 Mont. 570, 9 P. (2d) 172	11n
Dowling v. *Western Union Telegraph Co.* (1st C. C. A., 1937) 92 F. (2d) 864, 865	11n
Great Northern Ry. v. *Delmar Co.* (1931) 283 U. S. 686, 690, 691	14
Ingram v. *Hughes* (1933) 170 S. C. 1, 169 S. E. 425	11n
Jacobs v. *Western Union Telegraph Co.* (1917) 196 Mo. App. 300, 196 S. W. 31	11n

PAGE

Klotz v. *Western Union Telegraph Co.* (1920) 187 Iowa 1355, 175 N. W. 825, 831 ..... 11n
Kothe v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226 ..... 15n, 18

Legault v. *Board of Trustees* (1911) 161 Cal. 197 12
Lynch v. *Western Union Telegraph Co.* (1929) 224 Mo. App. 50, 18 S. W. (2d) 535 ..... 11n

Miazza v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 178 S. E. 764 ..... 5, 15, 15n

Naive-Spillers Corp. v. *Postal Telegraph-Cable Co.*, 4 Tenn. App. 435 ..... 11n
Nolte Brass Foundry Co. v. *Western Union Telegraph Co.* (D. C. Ohio, 1930) 38 F. (2d) 838, 841 ..... 11n

Primrose v. *Western Union Telegraph* (1894) 154 U. S. 1 7

Railroad Company v. *Lockwood* (1873) 17 Wall. 357, 384 ..... 6n

San Giorgio I v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496 ..... 6n, 10
S. E. Express Co. v. *Pastime Amusement Co.* (1936), 299 U. S. 28 ..... 9n, 14
Sun Printing & Publishing Assn. v. *Moore* (1902), 183 U. S. 642 ..... 16, 17, 18

Thayer v. *Western Union Telegraph Co.* (1937). Not officially reported. 6 N. E. (2d) 821 ..... 11n

United States v. *United Engineering Co.* (1914) 234 U. S. 236, 241 ..... 15n

Waters v. *Western Union Telegraph Co.* (1927) 194 N. C. 188, 138 S. E. 608, 611 ..... 11n

PAGE

Western Union v. *Czizek* (1924) 264 U. S. 281 . . 8, 9, 13, 16, 17
Western Union Telegraph Co. v. *Anderson* (Tex. Civ. App. 1922. Not officially reported.) 245 S. W. 731, 732 . . . . . 13n
Western Union Telegraph Co. v. *Downs* (1929) 178 Ark. 933, 12 S. W. (2d) 887 . . . . . 11n
Western Union Telegraph Co. v. *Eckhardt* (Tex. Civ. App. 1927. Not officially reported.) 2 S. W. (2d) 505, modified and affirmed (Tex. Comm. App. 1929. Not officially reported.) 11 S. W. (2d) 777 . . 11n
Western Union Telegraph Co. v. *Esteve Bros. & Co.* (1921) 256 U. S. 566, 571 . . . . . 3n, 8, 10
Western Union Telegraph Co. v. *Geo. F. Fish, Inc.* (1925) 148 Md. 210, 129 Atl. 14 . . . . . 11n
Western Union Telegraph Co. v. *Halbert* (1921) 124 Miss. 214, 86 So. 760, 761 . . . . . 11n
Western Union Telegraph Co. v. *Jacobs* (1926) 115 Tex. 240, 246, 280 S. W. 733 10
Western Union Telegraph Co. v. *Lee* (1917) 174 Ky. 210, 192 S. W. 70 . . . . . 11n
Western Union Telegraph Co. v. *Priester* (1928) 276 U. S. 252, 259 . . . . . 3n, 8, 10, 18
Western Union Telegraph Co. v. *Sharp* (Tex. Civ. App. 1928. Not officially reported.) 5 S. W. (2d) 567 . . . . . 11n
Western Union Telegraph Co. v. *Schriver* (8th C. C. A., 1905) 141 Fed. 538 . . . . . 12n
Western Union Telegraph Co. v. *T. C. Davis Cotton Co.* (1926) 170 Ark. 506, 280 S. W. 977, 979 . . . . . 10n
Wernick v. *Western Union Telegraph Co.* (1937) 290 Ill. App. 569, 9 N. E. (2d) 72 5
Williams v. *Western Union Telegraph Co.* (1925) 218 Mo. App. 364, 275 S. W. 570, 572 . . . . . 10n
Wise v. *United States* (1919) 249 U. S. 361, 365 . . . . . 15n

AUTHORITIES CITED.

	PAGE
35 A. L. R. 336	7
62 C. J. 171, 177	7
52 Harv. L. Rev. 839; 24 Corn. L. Q. 601; 88 University of Pennsylvania Law Review, No. 2, 224	20
11 L. R. A. (N. S.) 561	7
Judicial Code, section 240(a), Act of February 13, 1925	2
Limitations of Liability in Transmitting Telegrams, 44 I. C. C. 670, 675	13
61 I. C. C. 541	12, 13
26 R. C. L. 570	7
Restatement of the Law of Contracts, sec. 575 (1)	6n, 9n

IN THE

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OCTOBER TERM, 1939.

No.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, Copartners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States circuit court of appeals for the ninth circuit entered in the above entitled cause (R. 158), affirming the judgment (R. 50) of the district court of the United States for the southern district of California, central division.

Opinions Below

The opinion of the circuit court of appeals (R. 144) is reported at 106 Fed. (2d) 587. The district court rendered two opinions (R. 21, 39), both of which are reported at 25 F. Supp. 478.

Jurisdiction

The judgment of the circuit court of appeals was entered on September 15, 1939 (R. 159). A timely petition for rehearing was denied on November 27, 1939 (R. 159). The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

The question presented is: Does the limitation of liability provision in petitioner's money order tariff—which is substantially the same as that in its telegraph tariff—constitute a liquidated damage provision which would automatically make petitioner liable for damages in the fixed sum of $500, in case of default in service, regardless of whether or not the sender had sustained any actual damage, or is the provision rather one which fixes a maximum limit within which damages may be proved?

The provision of petitioner's money order tariff involved in this case is (R. 46):

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, UNLESS a greater value is stated in writing on the face of the application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The court below construed this clause as providing for liquidated damages of $500, regardless of actual damages, whenever the telegraph company fails promptly to transmit the money.

Statutes Involved

The statutes involved are set forth in the Appendix to this petition.

Statement of the Case

On September 1, 1937, respondent Nester paid petitioner, at Los Angeles, California, $150 to be transmitted to respondent Charles at Aramecina, Republic of Honduras (R. 45). By mistake of one of petitioner's employees, the money was sent to British Honduras instead of the Republic of Honduras and was not paid to Charles (R. 45-46).

The provision of petitioner's money order tariff limiting its liability is that set forth above. This provision was part of a schedule of charges, or tariff, which petitioner had filed with the Interstate Commerce Commission on March 9, 1932, and which, under the provisions of the Communications Act of 1934 (Appendix, p. 25), was transferred to the files of the Federal Communications Commission and remained in force after the enactment of that statute (R. 119). By virtue of this statute the rates in petitioner's tariffs on file with the Commission are the only lawful rates on interstate and foreign messages, and the limitation of liability provisions are "a part of the rates themselves" and "the lawful condition upon which [messages are] sent."*

Respondents brought this action against petitioner and one of its employees** to recover special damages in the amount of $7,600 claimed to have been suffered by reason of the non-payment of the money (R. 2, 6-8). Petitioner

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* *Western Union Telegraph Co.* v. *Priester* (1928) 276 U. S. 252, 259.
Western Union Telegraph Co. v. *Esteve Bros. & Co.* (1921) 256 U. S. 566, 571.

** The action was dismissed as to the employee (R. 50).

answered, denying that respondents had suffered any damage (R. 12), and, as a separate defense, pleading that under the above provision in the money order tariff petitioner, in any event, would not be liable beyond the sum of $500 (R. 12-16).

At the conclusion of the trial (a jury having been waived, R. 20), the district court held that respondents had failed to prove that they had suffered any damage by reason of the non-payment of the money (R. 24-25). Nevertheless, the court directed the entry of judgment against petitioner for $500, on the ground that the above-quoted provision in the money order tariff is "a provision for liquidated damages which entitled the sender to recovery of the minimum amount of $500 *in the absence of any proof [of damages] or without any offer of proof*" (R. 26).* This ruling was directly opposed to the allegations and prayer of the complaint and to the theory upon which the case had been brought and tried (R. 27-28), and was made by the court on its own motion, the point not having been raised by either of the parties. Petitioner objected to proposed findings based upon the ruling (R. 35-36), but the court overruled these objections (R. 39) and, in a supplementary opinion, adhered to its conclusions (R. 39-43).

The circuit court of appeals affirmed the judgment of the district court (R. 158). Judge Wilbur dissented (R. 151).

Specifications of Errors to be Urged

The circuit court of appeals erred:

1. In holding that the limitation of liability provision in petitioner's money order tariff is a provision for liquidated damages.

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* Emphasis by italics is ours throughout the petition unless otherwise noted.

2. In holding that respondents are entitled to recover $500 from petitioner in the absence of proof of actual damages in any amount.

Reasons for Granting the Writ

1. The decision of the circuit court of appeals is in conflict with *Wernick* v. *Western Union Telegraph Co.* (1937) 290 Ill. App. 569, 9 N. E. (2d) 72, and *Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 178 S. E. 764—the only two cases in which the question here involved has ever been raised. In the *Wernick* case the court held (290 Ill. App., pp. 573-574):

> "Although this particular clause has been a part of the rules, regulations, classifications and tariffs of the telegraph company since 1921, it has never been interpreted as a liquidated damage provision, and no cases are cited which would justify such an interpretation. * * * The fair interpretation of the provision as a whole must necessarily give effect to the plainly expressed clauses which precede and follow the so-called liquidated damage provision, stating that '*in any event, the company shall not be liable for damages* for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents, servants, or otherwise, *beyond the sum of $500* * * *, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid, based on such value, equal to one-tenth of 1 per cent thereof.' The provision, when read in its entirety, was clearly intended to fix, not a definite liability, but a maximum liability or agreed valuation upon which the rate to be paid for the shipment or carriage is to be collected." (Italics by the court.)

In the *Miazza* case the plaintiff sought to recover $500 without proof of actual damage, alleging in his complaint that the above provision in petitioner's tariff is one for

liquidated damages. The court sustained a demurrer, holding that the provision is not one for liquidated damages and that, if it were construed to provide for payment of $500 without proof of actual damage, it would be an invalid penalty.

2. The decision of the circuit court of appeals is untenable, is utterly without precedent, and is inconsistent with prior decisions of this court, and of lower federal and state courts.

A glance at the history of the tariff provision in question and the reasons which lead to its adoption will, we submit, make manifest the error of the court below.

It long has been settled that a common carrier "cannot contract for relief from liability for his own negligence, even though he give a special consideration for an agreement to that effect."* And the general common law rule is that

> "A bargain for exemption from liability * * * for the consequences of negligence is illegal if
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> * * * * * * *
>
> "(b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public for which it has received or been promised compensation."**

It is also settled, however, that a common carrier may limit its liability for negligence *to the amount of an agreed value*, if it maintains rates dependent upon the value declared in writing by the shipper.***

Early in the history of telegraphy the limitation provisions in appellant's tariffs were similar to those involved

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* *San Giorgio I.* v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496; *Railroad Company* v. *Lockwood* (1873) 17 Wall. 357, 384.

** Restatement of the Law of Contracts, sec. 575 (1).

*** *Adams Express Co.* v. *Croninger* (1913) 226 U. S. 491.

in *Primrose* v. *Western Union Telegraph* (1894) 154 U. S. 1, which we quote in the footnote.* These provisions did *not* contain a valuation of the message. Their validity was attacked in numerous cases, on the ground that telegraph companies could not limit their liability for damage resulting from negligence. A conflict of authority arose—some cases sustaining the limitation provisions; others holding them void.** When the question finally came before this court in the *Primrose* case, the court sustained the provisions. It held that telegraph companies "are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities" (154 U. S. 14); and it decided that the strict rule of the common law, applicable to common carriers, should not be applied to telegraph companies. The court referred to the common law rule, however, as an analogy, and sustained the provisions on the ground that they did not provide for a complete exemption from liability, but offered alternative limits of liability for alternative rates.

The decision of this court in the Primrose case, however, did not completely protect telegraph companies against the

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* "[1st] • • • It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

"[2d] nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

"[3d] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages." (154 U. S. 13)

** The cases are legion. See, generally, 62 C. J. 171, 177; 26 R. C. L. 570; 11 L. R. A. (N. S.) 561; 35 A. L. R. 336.

possibility of unlimited liability for messages. Until 1910 telegraph companies were not subject to the Interstate Commerce Act. Their relations with their patrons were matters of contract, not subject to the rule of equality and uniformity even when the transactions were interstate. Each state court, in telegraph cases coming properly before it, was free to adopt its own views as to the construction and validity of the provision for limitation of liability for unrepeated messages, *Western Union* v. *Esteve Bros.*, 256 U. S. 566, *Western Union* v. *Priester*, 276 U. S. 252. A majority of the state courts continued to hold that the common law rule against limitation of liability for negligence was applicable—sometimes because the laws of the particular state declared telegraph companies to be common carriers—and pronounced the limitation invalid in the only cases in which it would have been of any use, namely, where there had been negligence. Many courts, including some federal courts, held that it did not apply to faults in the service which a repetition of the message would not have prevented; a view ultimately sustained by this court, *Western Union* v. *Czizek* (1924), 264 U. S. 281. It was also generally held (before 1910) that the stipulation was no protection to the company in cases of "gross negligence". Even after telegraph companies were brought under the Interstate Commerce Act in 1910, so that the rule of equality and uniformity applied to all interstate and foreign messages, and "gross" negligence made no difference, *Western Union* v. *Priester* (1928), 276 U. S. 252, and state courts were bound, as to such messages, to follow the decisions of this court as to the construction and validity of the limitations of liability, they still remained free to apply their own rules with respect to intrastate messages, which constitute a considerable proportion of the business. In this situation, under the compelling necessity to avoid the hazard of unlimited liability for a message costing only a few cents, petitioner

added to its tariffs the provision now in question,* phrasing it strictly pursuant to the rule that

> "A bargain by a common carrier or other person charged with a duty of public service *limiting to a reasonable agreed valuation the amount of damages recoverable* for injury to property by a non-wilful breach of duty is lawful."**

This rule applies, of course, not only to injuries to property, but also to every kind of damage resulting from default in service.***

In the light of the foregoing considerations the meaning and intent of the provision in question are free from doubt. It is a provision by which a value is declared—not for the purpose of fixing an amount of liquidated damages—*but for the purpose of fixing the applicable rate,* and, at the same time, the *maximum* liability in case of loss. It has so been construed and applied by this court. In *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281, 284-285, this

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* Clause 2 of the message tariff was first adopted with a limitation of liability of $50.00. This clause is quoted in the opinion of this court in *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281, 283. It is, as the court below pointed out (R. 149), substantially identical with the money order tariff provision here involved, and reads as follows:

> "2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, *at which amount this telegram is hereby valued,* unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

** Restatement of the Law of Contracts, sec. 575 (2).

*** *S. E. Express Co.* v. *Pastime Amusement Co.* (1936), 299 U. S. 28.

court, speaking of the similar provisions in petitioner's message tariffs, said:

> "* * * as in fact it [the alleged negligence of the company] is that of servants, reasonable self-protection is allowed to the master against their neglects. One such self-protection sanctioned by the decisions is *a valuation of the message, with liberty to the sender to fix a higher value on paying more for it.*"

See also,

Western Union Telegraph Co. v. *Esteve Bros. & Co.* (1921) 256 U. S. 566, 574, 575;
Western Union Telegraph Co. v. *Priester* (1928) 276 U. S. 252, 259.

Such provisions have been uniformly construed as entitling the sender to recover only for actual loss or damage up to, but not beyond, the amount of the declared value.

See

San Giorgio I v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496-497 (quoted from in the dissenting opinion, R. 155-156).

Illustrative of the rulings is the language of the court in *Western Union Telegraph Co.* v. *Jacobs* (1926) 115 Tex. 240, 246, 280 S. W. 733:

> "* * * we hold that the stipulations pleaded are obligatory upon Jacobs, but that he is entitled to recover *his damages within the $50.00 valuation.*"

Similar rulings occur in many cases, a number of which we cite in the footnote.* In these and numerous other cases

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* *Williams* v. *Western Union Telegraph Co.* (1925) 218 Mo. App. 364, 275 S. W. 570, 572;
Western Union Telegraph Co. v. *T. C. Davis Cotton Co.* (1926) 170 Ark. 506, 280 S. W. 977, 979;

(*Footnote continued on next page.*)

the courts have rendered decisions upon the unquestioned assumption that recovery can be had only for damages actually sustained, up to the limit of the declared value;* *never* before has any court allowed a recovery except for actual loss.

Although the earlier cases do not deal with the exact point decided in the case at bar they nevertheless establish, we submit, the correct construction of petitioner's tariff. It is "inconceivable," to use the language of the court in

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Thayer v. *Western Union Telegraph Co.* (1937). Not officially reported. 6 N. E. (2d) 821;
Waters v. *Western Union Telegraph Co.* (1927) 194 N. C. 188, 138 S. E. 608, 611;
Nolte Brass Foundry Co. v. *Western Union Telegraph Co.* (D. C. Ohio, 1930) 38 F. (2d) 838, 841;
Dowling v. *Western Union Telegraph Co.* (1st C. C. A., 1937) 92 F. (2d) 864, 865;
Klotz v. *Western Union Telegraph Co.* (1920) 187 Iowa 1355, 175 N. W. 825, 831;
Western Union Telegraph Co. v. *Halbert* (1921) 124 Miss. 214, 86 So. 760, 761.

* For examples, in addition to the decisions of this court above cited, see:
Western Union Telegraph Co. v. *Downs* (1929) 178 Ark. 933, 12 S. W. (2d) 887;
Western Union Telegraph Co. v. *Eckhardt* (Tex. Civ. App. 1927. Not officially reported.) 2 S. W. (2d) 505, modified and affirmed (Tex. Comm. App., 1929. Not officially reported.) 11 S. W. (2d) 777;
Western Union Telegraph Co. v. *Sharp* (Tex. Civ. App., 1928. Not officially reported.) 5 S. W. (2d) 567;
Davenport v. *Western Union Telegraph Co.* (1932) 91 Mont. 570, 9 P. (2d) 172;
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Naive-Spillers Corp. v. *Postal Telegraph-Cable Co.*, 4 Tenn. App. 435;
Western Union Telegraph Co. v. *Geo. F. Fish, Inc.* (1925) 148 Md. 210, 129 Atl. 14;
Western Union Telegraph Co. v. *Lee* (1917) 174 Ky. 210, 192 S. W. 70;
Ingram v. *Hughes* (1933) 170 S. C. 1, 169 S. E. 425;
Lynch v. *Western Union Telegraph Co.* (1929) 224 Mo. App. 50, 18 S. W. (2d) 535.

Legault v. *Board of Trustees* (1911) 161 Cal. 197, that, if the provision in question were a stipulation for liquidated damages, this court and the lower federal and state courts would not "long ago have so declared and thus have done away with a vast amount of the argumentative reasoning in which [they have] indulged and which is and was entirely superfluous if the contention of appellant herein is sound."*

3. The decision of the circuit court of appeals is inconsistent with the order of the Interstate Commerce Commission under which the tariff provision in question has been promulgated and the rates of petitioner established thereunder. As such the decision raises an important question of federal law which should be settled by this court.

In 1921 the Interstate Commerce Commission reopened an investigation of the "Rules Limiting Liability on the Several Classes of Messages, Dependent upon the Rates Paid". *Limitations of Liability in Transmitting Telegrams*, 61 I. C. C. 541. A tariff provision substantially identical with the one involved in this case was before the Commission, except that at that time the liability was limited in the case of messages not specially valued to $50. Following this investigation the Commission concluded that the existing limitation of liability provisions in the company's rates were unreasonable; and it ordered (p. 550)

> " . . . that the *maximum liability* in the case of a message for the transmission of which the unrepeated rate is charged should be not less than $500, and for a message received for transmission at the repeated rate, $5,000, which *limitations* we find to be reasonable as parts of the respective rates."

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* To the same effect, see

Atkins v. *The Disintegrating Company* (1873) 18 Wall. 272, 305-306;

Western Union Telegraph Co. v. *Schriver* (8th C. C. A., 1905) 141 Fed. 538.

This determination was based upon the well-settled construction by the Interstate Commerce Commission of rules limiting liability that the company "within the value so placed upon the message assumes liability to the full extent *of the loss sustained*". 44 I. C. C. 670 at 675. The Commission did not sustain as reasonable rates which would include a stipulation to pay liquidated damages.*

The Commission had said of the original fifty-dollar valuation clause in the message tariff, which this court had before it later in *Western Union* v. *Czizek* (1924) 264 U. S. 281:

> "To afford protection against extravagant claims for damages on account of errors or delays which a repetition of the message would not have prevented provision is made by the Western Union for *a limitation of liability* to $50.00 * * * ". 61 I. C. C. 543.

And its order was that this maximum limit of liability should be increased: "Provision should be made for the transmission of valued messages *under a liability limited to* the value stated in writing by the sender of the message at the time it is offered for transmission" etc. In pursuance of this direction petitioner filed new message tariffs, containing a valuation clause identical in language except for the increased amount of the valuation; a clause beyond question intended, and understood by the Commission to be intended, to provide for a maximum limitation of liability and nothing else (R. 59). The valuation clause in the money transfer tariff, which is the particular tariff in-

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* Construing this order of the Commission, the court in *Western Union Telegraph Co.* v. *Anderson* (Tex. Civ. App. 1922. Not officially reported.) 245 S. W. 731, 732, said:

> "It thus clearly appears that the Commission was not undertaking to fix a minimum of absolute liability in cases of negligence in the transmission or non-delivery of interstate messages, but a minimum below which telegraph companies could not limit their maximum liability."

volved here, was substantially copied* from the message tariff except for the amount.

The construction given to the provisions by the court below is untenable because repugnant to the rule that where one possible construction of a tariff will make it valid, and another construction will render it unlawful, the former construction will be adopted.

Great Northern Ry. v. *Delmar Co.* (1931) 283 U. S. 686, 690, 691.

If petitioner's rates are construed—as they have been by the court below—to include an agreement to pay $500 in every case of default in service without proof of any loss, they would be unlawful, not only because they would be inconsistent with the order of the Interstate Commerce Commission in *Limitations of Liability in Transmitting Telegrams, supra,* but also because they would be palpably unjust and unreasonable and thus in violation of the provisions of section 201 of the Communications Act of 1934 (Appendix, p. 23).

The unreasonableness of petitioner's rates, as construed by the court below, is sufficiently apparent in the

* The message tariff makes the sender value the message and the money order tariff makes him value the right to have the money paid; but there is no difference in the legal effect. Both clauses, like the corresponding provision in a railroad or express tariff, apply not only to cases where the articles themselves are lost, but to damages from delay, that is to say for the violation of the *right* to have the goods delivered. *S. E. Express Company* v. *Pastime Company,* (1936) 299 U. S. 28. Even when a carrier loses goods in transit the recovery, in the last analysis, like all civil recoveries, is a recovery for the violation of a right—the right to have the goods transported safely. There was some question at the beginning whether the valuation of a "money order" would be held valid, since the money order—the piece of paper—can have no value, and it was thought that some court might insist that the only thing that was valuable was the right to have it paid, which had not been valued.

present case; it is even more apparent if the case of a specially valued message is supposed. In such case a sender could tender $1.00 for transmission to petitioner, declare the value of his right to have this money promptly transmitted to be $100,000, and then, if he were able to prove delay or nonpayment by reason of the negligence of any one of petitioner's servants, collect $100,000 from petitioner without proof of the loss of a single cent.

Moreover the provision, as construed by the court below, is an invalid penalty. An agreement to pay a fixed sum will be given effect as a provision for liquidated damages only when it is clear that the sum named is a *bona fide* pre-estimate of the probable damages which would follow a breach of contract.* If the agreement is "to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach," it is an unenforceable penalty.**

As construed by the court below, the clause provides for payment of $500 in every case, regardless of circumstances, where the company fails promptly to transmit and pay the money. This is a penalty. In *Miazzà* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 522-523, 178 S. E. 764, the court, so ruling, said:

> "Agreements to pay fixed sums as damages for breaches of contracts, where the amount plainly has no reasonable relation to any probable actual damage which may follow a breach, will not be enforced for the agreed amount as liquidated damages, but

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* *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226; *United States* v. *United Engineering Co.* (1914) 234 U. S. 236, 241; *Wise* v. *United States* (1919) 249 U. S. 361, 365.

** *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226; *Miazza* v. *Western Union Telegraph Co.*, 50 Ga. App. 521, 178 S. E. 764, 765.

will be construed as mere unenforceable provisions for penalties. [Cases.]

Since the petition and its exhibits plainly indicate that the amount printed in the ordinary printed blank form of the telegraph company as the value of the plaintiff's right to have the money promptly and correctly transmitted and paid to the addressee did not represent any bona fide effort between the parties to fix in advance the actual damage to the plaintiff from any breach of the contract by the defendant, but since the petition and the exhibits show that the stipulation contained in the usual printed form represented no more than an attempt to set up a fixed and uniform penalty for any and all breaches of the contract without any reference to the facts or circumstances or the actual damages sustained, such a provision will not support an action for a failure to perform the contract."

4. The circuit court of appeals misconstrued and misapplied the decisions of this court in *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281, and *Sun Printing & Publishing Assn.* v. *Moore* (1902), 183 U. S. 642.

The court below erroneously construed the provision in question as containing two completely separate and unrelated clauses (R. 149-151). In support of this ruling it said that this court, in the *Czizek* case, adverted to the "distinction between the two clauses" as follows (264 U. S. 281, 285):

> "We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case * * *"

This is a plain misapplication of the decision of this court. The tariff involved in the *Czizek* case *did* contain two sepa-

rate clauses, which we quote in the footnote;* but only *one* of the separate clauses referred to in that case is contained in the tariff covering the money order involved in the case at bar. When this court referred to the distinction between the two clauses in the *Czizek* case, it referred to the distinction between *separate* clauses 1 and 2. It held clause 2 (the clause here involved) applicable and treated it as one indivisible clause under which petitioner's liability is "limited" to the amount of the declared value (264 U. S. 281, 286).**

Both courts below also misapplied the *Sun Printing & Publishing* case (R. 26, 41, 151). That case involved an ordinary contract—not a limitation of liability provision in the tariff of a telegraph company which, as a matter of law, is a part of the established rates (*Western Union Tele-*

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* "1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for the non-delivery, of any repeated telegram beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty-Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one percent. thereof" (264 U. S. 281, 283; 276 U. S. 252, 257).

** While it is not pertinent to the question involved in the case at bar, it may be noted that this court, in the *Czizek* case, held clause 1 inapplicable for the following reason: That case involved an unrepeated message. At the time of the decision, many courts had held that clause 1 (as it then read) was not intended to apply to the sort of default in service which repetition would not have prevented. The message in the *Czizek* case was never sent from the office of origin, and was, therefore, in this class.

graph Co. v. Priester, 276 U. S. 252, 259). In the *Sun Printing & Publishing Association* case, the intent of the parties to provide for liquidated damages was clear; in the present case it is entirely lacking. In the former case, as this court pointed out, the parties agreed *bona fide* upon the actual value of the yacht, and intended "to treat the sum named as estimated and ascertained damages for a breach of the covenant to return the yacht" (183 U. S. 668). If the charterer had thought that the yacht was not worth $75,000, he could have insisted that the valuation be reduced or be dispensed with entirely, or he could have refused to hire the yacht. Petitioner's position, under the provision in the case at bar, is totally different. It cannot refuse a money order; it cannot dispense with the valuation, it cannot alter the valuation—no matter how high, or how arbitrary, under the circumstances, the value may appear. Any sender may name any value he wishes, $1,000; $100,000—and petitioner, as a matter of law, must accept the value. If a special value is not stated, the $500 valuation is applicable—again as a matter of law—whether the money order be large or small, important or of little consequence. Such a provision does not reflect an intent by both of the parties to pre-estimate and agree upon probable damages. On the contrary, the clause itself and the circumstances surrounding its adoption "negative any notion that the parties really meant to provide a measure of compensation" (*Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 226).

5. The decision of the circuit court of appeals involves an important question of federal law which has not been, but should be, settled by this court.

The limitation provision here in question has been a part of the money order tariff for nearly eight years; it is substantially identical with provisions which have been in petitioner's message tariffs for more than twenty-nine

years. Following the decision of the circuit court of appeals petitioner amended its tariffs to avoid any possibility of further misconstruction. The amended tariffs apply, however, only to future transactions, and the precautionary filing of the amendments does not affect the importance of the instant case. Petitioner has transmitted during the past few years nearly one-half million revenue-bearing messages every day, exclusive of the millions of special greeting messages transmitted on holidays; of these, approximately 3,000,000 per year were money orders. The average number of handlings per message is five; and, notwithstanding every precaution, the ratio of default in telegraph service is approximately 1 to 2000. Petitioner's potential liability under the decision below with respect to money orders alone (sent within the applicable periods of limitation) is approximately twelve million dollars. The imposition of such a burden and the attendant burden of litigation would affect in a most serious manner petitioner's service to the public. Since the rendition of the decision of the district court in this case, claims and suits based upon the decision have been filed against petitioner, and petitioner has been notified that, as to complaints already on file, the plaintiffs will seek recovery on the theory advanced by the courts below; it is a virtual certainty that numerous other suits will be filed. In this connection we emphasize that there is little if any possibility that a conflict of decisions between circuit courts of appeals will hereafter arise. Diversity of citizenship is or ordinarily will be present and the question is one of federal law, but the amount involved—$500—is less than the amount required to give a federal court jurisdiction. The conflict presently existing—between the decision below and that of the highest court of a state in which a decision could be had by petitioner (supra, pp. 5, 6)—is, therefore, the only conflict of decisions upon which petitioner can rely.

The general importance which is attached to the decision in this case is also shown by three recent case notes, two of them commenting adversely on the decision of the district court (52 Harv. L. Rev. 839; 24 Corn. L. Q. 601), and one commenting adversely on the decision of the circuit court of appeals. (88 University of Pennsylvania Law Review, No. 2, 224).

Conclusion

The petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
December 18, 1939.

Respectfully submitted,

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APPENDIX.

APPLICABLE PROVISIONS OF THE INTERSTATE COMMERCE ACT AND OF THE COMMUNICATIONS ACT OF 1934.

By the Act of June 18, 1910 (36 Stat. 539, 544, et seq.), the Interstate Commerce Act was amended to include telegraph companies. They remained subject to the Interstate Commerce Act, and to the jurisdiction of the Interstate Commerce Commission, until the enactment of the Communications Act of 1934 (48 Stat. 1064).

The provisions of the Interstate Commerce Act pertinent to the case at bar, as they read prior to the enactment of the Communications Act of 1934, are as follows (U.S.C. 49:1, et seq.):

"Section 1. (1) The provisions of this chapter shall apply to common carriers engaged in—

* * * * * * *

(e) The transmission of intelligence by wire or wireless from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

* * * * * * * *

(3) The term 'common carrier' as used in this chapter shall include * * * telegraph, telephone, and cable companies operating by wire or wireless; * * *.

* * * * * * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith,

shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by wire or wireless subject to the provisions of this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: * * *.

* * * * * * *

Section 15. (1) Whenever, after full hearing, * * * the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier * * * for the transmission of messages * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, * * *."

The provisions of the Communications Act of 1934, pertinent to the case at bar, are as follows (U.S.C. 47:151, et seq.):

"Section 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio * * * and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commis-

sion', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Section 152. (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio * * *.

* * * * * * *

Section 201.

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(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: * * *.

* * * * * * *

Section 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting

carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

* * * * * * *

Section 602.

* * * * * * *

(b) The provisions of Chapter 1 of Title 49 [the Interstate Commerce Act], insofar as they relate to communication by wire or wireless, or to telegraph, telephone, or cable companies operating by wire or wireless, except the last proviso of section 1 (5) and the provisions of section 1 (7), are repealed.

* * * * * * *

Section 603.

* * * * * * *

(b) There are transferred to the jurisdiction and control of the Commission * * * (2) all records under the jurisdiction of the Interstate Commerce Commission * * * relating to the duties, powers, and functions imposed upon and vested in the Commission by this chapter.

* * * * * * *

Section 604. (a) All orders, determinations, rules, regulations, permits, contracts, licenses, and privileges which have been issued, made, or granted by the Interstate Commerce Commission, * * * under any provision of law repealed or amended by this chapter or in the exercise of duties, powers, or functions transferred to the Commission by this chapter, and which are in effect at the time this section takes effect, shall continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law."